



**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 12, 32, and 52**

**[FAC 2023-02; FAR Case 2020-007; Item I; Docket No. FAR-  
2020-0007, Sequence 1]**

**RIN 9000-AO10**

**Federal Acquisition Regulation: Accelerated Payments  
Applicable to Contracts with Certain Small Business  
Concerns**

**AGENCY:** Department of Defense (DoD), General Services  
Administration (GSA), and National Aeronautics and Space  
Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** DoD, GSA, and NASA are issuing a final rule  
amending the Federal Acquisition Regulation (FAR) to  
implement a section of the National Defense Authorization  
Act for Fiscal Year 2020 to provide for accelerated  
payments to small business contractors and subcontractors  
and a comparable statute applicable only to the Department  
of Defense.

**DATES:** Effective [INSERT DATE 30 DAYS AFTER DATE OF  
PUBLICATION IN THE *FEDERAL REGISTER*].

**FOR FURTHER INFORMATION CONTACT:** Ms. Zenaida Delgado,  
Procurement Analyst, at 202-969-7207 or by email at

*zenaida.delgado@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755 or *GSARegSec@gsa.gov*. Please cite FAC 2023-02, FAR Case 2020-007.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

DoD, GSA, and NASA published a proposed rule at 86 FR 53923 on September 29, 2021, to implement a policy that provides for accelerated payments to contractors that are small businesses and to small business subcontractors by accelerating payments to their prime contractors. This change implements section 873 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Pub. L. 116-92). Section 873 amends 31 U.S.C. 3903(a).

Specifically, section 873 requires agencies to establish an accelerated payment date for small business prime contractors, to the fullest extent permitted by law, with a goal of 15 days after receipt of a proper invoice, if a specific payment date is not established by contract. Section 873 also requires that, to the fullest extent permitted by law, the head of an agency establish an accelerated payment date for prime contractors that subcontract with small businesses, with a goal of 15 days after receipt of a proper invoice, if-

(1) A specific payment date is not established by contract; and

(2) The contractor agrees to make accelerated payments to the subcontractor without any further consideration from, or fees charged to, the subcontractor. The final rule implements both aspects of section 873. For DoD, however, this case implements section 815 of the William M. (Mac) Thornberry NDAA for FY 2021, which amended 10 U.S.C. 2307(a)(2)(A) (now found at 10 U.S.C. 3801) by striking the language "if a specific payment date is not established by contract." Accordingly, this case excludes from DoD contracts the condition reflected in the language "a specific payment date is not established by contract."

Four respondents submitted comments on the proposed rule.

## **II. Discussion and Analysis**

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

### *A. Summary of Significant Changes*

There are no significant changes from the proposed rule.

### *B. Analysis of Public Comments*

Of the four responses received, none provided negative comments on the rule, although they suggested changes as described below. No changes resulted from the public comments.

*Comment:* A respondent suggested adding the following language: "the term "other required documentation" shall exclude documentation that is not commercially reasonable in the circumstances, unless such documentation is required by law." This respondent stated that its suggested change is meant to prevent "the occasional agency or prime contractor [from evading] acceleration of payment under the proposed rules by establishing unreasonable requirements for documentation that a small business cannot meet."

*Response:* The Councils cannot accept the suggestion because it is not consistent with the statute being implemented. Section 873 of the NDAA for FY 2020 did not create or modify a definition of "other required documentation." The term "other required documentation" and other similar variations are used in many instances in the FAR and other agency regulations. Also, such "documentation" may be required by the contract or law, or both. The Councils concluded that "other required documentation" should be sufficient; and that adding the suggested language will not make the issue any clearer.

*Comment:* A respondent expressed the need for the rule to clarify the statement "with a goal of 15 days after

receipt of proper invoice, if - (1) a specific payment date is not established by contract..." The respondent expressed concern that a contracting officer may insert "any type of specific date - i.e., 30 days, 60 days or 90 days into their contracts." This respondent suggested to remove the term "goal" and make the accelerated payment "a requirement and that there be oversight within contracts to make certain the requirement is being achieved."

*Response:* Congress has directed DoD to "establish an accelerated payment date with a goal of 15 days after a proper invoice for the amount due is received." See section II.C. of this preamble. For civilian agencies, the Councils cannot accept the suggestion because it is not consistent with the statute.

*Comment:* A respondent expressed that small business contractors having to flow down the accelerated payment to their small business subcontractors would "essentially eliminate any financial assistance by negating the benefit of the accelerated timeline." This respondent expressed that the flowdown requirement "could put an undue burden onto many small business primes who do not track the size status of their subcontractors since they are not subject to the same reporting requirements of large businesses. Being required to implement a tracking system to comply with the flowdown of accelerated payments could prove to be an additional unintended expense on the small business that

would once again negate the financial benefit of accelerated payment."

*Response:* The Councils cannot accept the suggestions because they are not consistent with the statute being implemented. Section 873 of the NDAA for FY 2020 requires the flowdown. The statute and the final rule do not include additional reporting or recordkeeping requirements.

*Comment:* A respondent expressed strong support for the rule and urged the Councils "to include in the final rule an expansion of the provision to apply these accelerated payment requirements to large business subcontractors." A respondent expressed support for the rule but believed that more analysis of the financial and administrative impact of accelerating payments to large subcontractors is required. This respondent provided three examples of questions that need to be answered: 1) How will it affect contractor ERP systems and reporting? 2) What administrative costs will be incurred and what is the overall financial impact? 3) How will the requirement be integrated with existing regulations that already dictate when payments must be made to subcontractors (i.e., FAR 52.232-16, FAR 52.216-7)?

*Response:* In the preamble to the proposed rule, the Councils noted their interest in understanding the implications of applying the accelerated payment requirements to large business subcontractors and flowing

them down to lower tier small business subcontractors. Interest in this issue remains, but additional research is needed to properly inform the process. The Councils, in coordination with the Office of Federal Procurement Policy, will consider whether further action through a new rulemaking should be pursued to address flowdown of accelerated payments, as well as other refinements that may be necessary to ensure the policy objective of accelerating payments to small business concerns has been achieved by the changes set forth in this rule.

### *C. Other Changes*

Other changes made to the final rule are as follows:

- To add a clarification at FAR 32.009-1(a) by creating paragraphs (a)(1) and (a)(2) to differentiate DoD from civilian agencies regarding the removal of the phrase "if a specific payment date is not established by contract" at 10 U.S.C. 3801 per section 815 of the William M. (Mac) Thornberry NDAA for FY 2021, Public Law 116-283; the statutory text was moved from 10 U.S.C. 2307(a) to 10 U.S.C. 3801.

- To make editorial corrections at: 52.213-4(a)(1)(x) to be consistent with the FAR 52.233-4 citation at FAR 52.212-5.

### **III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Products,**

**Including Commercially Available Off-the-Shelf (COTS)  
Items, or for Commercial Services**

This rule does not add any new solicitation provisions or contract clauses. This rule amends the following FAR clauses: 52.212-5, Contract Terms and Conditions Required To Implement Statutes or Executive Orders-Commercial Products and Commercial Services; 52.213-4, Terms and Conditions-Simplified Acquisitions (Other Than Commercial Products and Commercial Services); 52.232-40, Providing Accelerated Payments to Small Business Subcontractors; and 52.244-6, Subcontracts for Commercial Products and Commercial Services.

The FAR rule makes the 10 U.S.C. 2307(a) (now found at 10 U.S.C. 3801) and 31 U.S.C. 3903 statutory changes to a requirement already applicable to contracts at or below the SAT and to contracts for the acquisition of commercial products and commercial services, including COTS items.

The Federal Acquisition Regulatory Council (FAR Council) is applying the rule to contracts at or below the SAT and acquisitions of commercial products and commercial services, including acquisitions for COTS items, in accordance with 41 U.S.C. 1905, 41 U.S.C. 1906, and 41 U.S.C. 1907. Discussion of the FAR Council determinations is set forth below.

**A. Applicability to Contracts at or Below the  
Simplified Acquisition Threshold**

41 U.S.C. 1905 governs the applicability of laws to acquisitions at or below the SAT. Section 1905 generally limits the applicability of new laws when agencies are making acquisitions at or below the SAT, but provides that such acquisitions will not be exempt from a provision of law under certain circumstances, including when the FAR Council makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts and subcontracts in amounts not greater than the SAT from the provision of law.

The FAR Council has made a determination to apply this statute to contracts and subcontracts at or below the SAT. These accelerated payments provide benefits to contractors that are small businesses, to contractors that subcontract with small businesses, and to small business subcontractors by accelerating payments to their prime contractors, without adding any reporting or recordkeeping requirements. Approximately 96 percent of Federal contracts are in amounts at or below the SAT. An exception for contracts and subcontracts at or below the SAT would exclude contracts and subcontracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

**B. Applicability to Contracts for the Acquisition of Commercial products, Including Commercially Available Off-The-Shelf (COTS) Items, or for Commercial Services**

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial products and commercial services and is intended to limit the applicability of laws to those contracts. Section 1906 provides that if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts and subcontracts for commercial products and commercial services the provision of law will apply to them.

41 U.S.C. 1907 states that acquisitions of COTS items will be exempt from certain provisions of law unless the Administrator for Federal Procurement Policy makes a written determination and finds that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items.

The FAR Council has made a determination to apply this statute to contracts and subcontracts for commercial products and commercial services. The Administrator for Federal Procurement Policy has made a determination to apply this statute to acquisitions for COTS items. These accelerated payments provide benefits to contractors that are small businesses, to contractors that subcontract with small businesses, and to small business subcontractors by accelerating payments to their prime contractors, without adding any reporting or recordkeeping requirements. Over 50 percent of Federal contracts are awarded using

commercial procedures. An exception for commercial products and commercial services, including COTS items, contracts and subcontracts would exclude contracts and subcontracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

#### **IV. Expected Impact of the Rule**

The final rule expands the FAR policy regarding accelerated payments to small business contractors by: (1) providing accelerated payments to prime contractors that are small businesses; (2) establishing a goal of payment within 15 days after receipt of a proper invoice; and (3) prohibiting prime contractors from requesting any further consideration from the subcontractor in exchange for the accelerated payments. The Government expects this rule to improve cash flow and access to the Federal marketplace for small businesses, which are likely to have lower cash reserves and less access to inexpensive credit when compared to other than small businesses, i.e., large businesses.

#### **V. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health

and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

## **VI. Congressional Review Act**

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD, GSA, and NASA will send the rule and the "Submission of Federal Rules Under the Congressional Review Act" form to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the Federal Register. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has determined that this is not a major rule under 5 U.S.C. 804.

## **VII. Regulatory Flexibility Act**

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601-612. The FRFA is summarized as follows:

This final rule amends the FAR to provide for accelerated payments to contractors that are small businesses, and to small business subcontractors by accelerating payments to their prime contractors. Specifically, the statute requires agencies, to the fullest extent permitted by law, to establish

an accelerated payment date for small business contractors, with a goal of 15 days after receipt of a proper invoice, if a specific payment date is not established by contract. For contractors that subcontract with small businesses, the statute requires agencies, to the fullest extent permitted by law, to establish an accelerated payment date, with a goal of 15 days after receipt of a proper invoice, if-

(a) A specific payment date is not established by contract; and

(b) The contractor agrees to make accelerated payments to the subcontractor without any further consideration from, or fees charged to, the subcontractor.

For DoD, however, this rule implements section 815 of the William M. (Mac) Thornberry NDAA for FY 2021, which amended 10 U.S.C. 2307(a)(2)(A) (now found at 10 U.S.C. 3801) by striking the language "if a specific payment date is not established by contract." Accordingly, the final rule excludes from DoD contracts the condition reflected in the language "a specific payment date is not established by contract."

The objective is to implement section 873 of the NDAA for FY 2020 (Pub. L. 116-92), which amends 31 U.S.C. 3903(a). The rule also implements a change made by section 815 of the William M. (Mac) Thornberry NDAA for FY 2021 to 10 U.S.C. 2307(a), now found at 10 U.S.C. 3801, which requires DoD to keep the 15 days rather than allow a different specific date to be established in the contract.

There were no significant issues raised by the public comments in response to the initial regulatory flexibility analysis.

The final rule applies to small businesses that are prime contractors, and to small businesses that are subcontractors on Federal prime contracts. Based on data obtained from the Federal Procurement Data System, 120,907 unique entities (including 78,813 small businesses) were awarded contracts for FY 2021. There is no data source to know how many subcontracts are awarded to small businesses. With regard to the impact of the prohibition on fees or other consideration in return for accelerated payments, it is not possible to estimate how many of these small business subcontractors may have been required to provide consideration or pay fees to the prime contractor in order to receive accelerated payments.

The final rule does not include additional reporting or recordkeeping requirements. There are no available alternatives to the final rule to accomplish the desired objective of the statute.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to

the Chief Counsel for Advocacy of the Small Business Administration.

#### **VIII. Paperwork Reduction Act**

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501-3521).

#### **List of Subjects in 48 CFR Parts 12, 32, and 52**

Government procurement.

William F. Clark,  
Director,  
Office of Government-wide  
Acquisition Policy,  
Office of Acquisition Policy,  
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 12, 32, and 52 as set forth below:

1. The authority citation for 48 CFR parts 12, 32, and 52 continues to read as follows:

**AUTHORITY:** 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

#### **PART 12—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES**

##### **12.301 [Amended]**

2. Amend section 12.301 by removing paragraph (d) (15).

## **PART 32—CONTRACT FINANCING**

3. Revise sections 32.009 and 32.009-1 to read as follows:

**32.009 Providing accelerated payments to small business contractors and to prime contractors that subcontract with a small business concern.**

### **32.009-1 General.**

(a)(1) Pursuant to 31 U.S.C. 3903(a), agencies other than the Department of Defense (DoD) shall provide accelerated payments, to the fullest extent permitted by law, with a goal of 15 days after receipt of a proper invoice and all other required documentation, if a specific payment date is not established by contract, to—

(i) Small business contractors; and

(ii) Prime contractors that subcontract with a small business concern, if the prime contractor agrees to make payments to the small business subcontractor within 15 days of receiving the accelerated payment from the Government, after receipt of a proper invoice and all other required documentation from the small business subcontractor, to the maximum extent practicable, without any further consideration from or fees charged to the subcontractor.

(2) Pursuant to 10 U.S.C. 3801(b), DoD shall provide accelerated payments, to the fullest extent

permitted by law, with a goal of 15 days after receipt of a proper invoice and all other required documentation, to—

(i) Small business contractors; and

(ii) Prime contractors that subcontract with a small business concern, if the prime contractor agrees to make payments to the small business subcontractor within 15 days of receiving the accelerated payment from the Government, after receipt of a proper invoice and all other required documentation from the small business subcontractor, to the maximum extent practicable, without any further consideration from or fees charged to the subcontractor.

(b) This acceleration does not provide any new rights under the Prompt Payment Act and does not affect the application of the Prompt Payment Act late payment interest provisions.

(c) Agencies may use the Governmentwide commercial purchase card as a method of payment (see 32.1108) to facilitate accelerated payment, to earn refunds, and to reduce invoice processing costs.

### **32.903 [Amended]**

4. Amend section 32.903 by removing from paragraph (a) (5) "5 CFR 1315.5" and adding "5 CFR 1315.5, but see 32.009-1(a)" in its place.

5. Amend section 32.906 by removing from paragraph (a) (2) "are necessary (see 32.903(a) (5))" and adding "is

necessary" in its place, and adding a sentence to the end of the paragraph.

The addition reads as follows:

**32.906 Making payments.**

(a) \* \* \*

(2) \* \* \* See 32.903(a)(5), but see 32.009-1(a).

\* \* \* \* \*

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

6. Amend section 52.212-5 by—

a. Revising the date of the clause;

b. Redesignating paragraphs (a)(5) and (6) as paragraphs (a)(6) and (7); and adding a new paragraph (a)(5);

c. Redesignating paragraph (e)(1)(xxii) as paragraph (e)(1)(xxiii); and adding a new paragraph (e)(1)(xxii); and

d. In Alternate II—

i. Revising the date of the Alternate;

ii. Redesignating paragraph (e)(1)(ii)((U) as paragraph (e)(1)(ii)(V); and adding a new paragraph (e)(1)(ii)((U);

The revisions and additions read as follows:

**52.212-5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services.**

\* \* \* \* \*

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE  
ORDERS—COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES ([**INSERT ABBREVIATED  
MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL  
REGISTER**])

(a) \* \* \*

(5) 52.232-40, Providing Accelerated Payments to  
Small Business Subcontractors ([**INSERT ABBREVIATED MONTH AND YEAR  
30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**]) (31 U.S.C.  
3903 and 10 U.S.C. 3801).

\* \* \* \* \*

(e) (1) \* \* \*

(xxii) 52.232-40, Providing Accelerated Payments  
to Small Business Subcontractors ([**INSERT ABBREVIATED MONTH AND  
YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**]) (31  
U.S.C. 3903 and 10 U.S.C. 3801). Flow down required in  
accordance with paragraph (c) of 52.232-40.

\* \* \* \* \*

Alternate II ([**INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER  
DATE OF PUBLICATION IN THE FEDERAL REGISTER**]). \* \* \*

(e) (1) \* \* \*

(ii) \* \* \*

(U) 52.232-40, Providing Accelerated Payments  
to Small Business Subcontractors ([**INSERT ABBREVIATED MONTH AND  
YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**]) (31  
U.S.C. 3903 and 10 U.S.C. 3801). Flow down required in  
accordance with paragraph (c) of 52.232-40.

\* \* \* \* \*

7. Amend section 52.213-4 by—

- a. Revising the date of the clause;
- b. Redesignating paragraphs (a)(1)(viii) and (ix) as paragraphs (a)(1)(ix) and (x); and adding a new paragraph (a)(1)(viii);
- c. Revising the newly redesignated paragraph (a)(1)(x);
- d. Removing paragraph (a)(2)(vi);
- e. Redesignating paragraphs (a)(2)(vii) through (ix) as paragraphs (a)(2)(vi) through (viii); and
- f. Removing from the newly redesignated paragraph (a)(2)(vii) “(DEC 2022)” and adding “([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER])” in its place.

The revisions and addition read as follows:

**52.213-4 Terms and Conditions—Simplified Acquisitions  
(Other Than Commercial Products and Commercial Services).**

\* \* \* \* \*

TERMS AND CONDITIONS—SIMPLIFIED ACQUISITIONS (OTHER THAN COMMERCIAL  
PRODUCTS AND COMMERCIAL SERVICES) ([INSERT ABBREVIATED MONTH AND YEAR 30  
DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER])

(a) \* \* \*

(1) \* \* \*

(viii) 52.232-40, Providing Accelerated Payments  
to Small Business Subcontractors ([INSERT ABBREVIATED MONTH AND

**YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]] (31**

U.S.C. 3903 and 10 U.S.C. 3801).

\* \* \* \* \*

(x) 52.233-4, Applicable Law for Breach of Contract Claim (OCT 2004) (Public Laws 108-77 and 108-78 (19 U.S.C. 3805 note)).

\* \* \* \* \*

8. Amend section 52.232-40 by revising the date of the clause and paragraph (a) to read as follows:

**52.232-40 Providing Accelerated Payments to Small Business Subcontractors.**

\* \* \* \* \*

PROVIDING ACCELERATED PAYMENTS TO SMALL BUSINESS SUBCONTRACTORS ([**INSERT**

**ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE**

**FEDERAL REGISTER])**

(a)(1) In accordance with 31 U.S.C. 3903 and 10 U.S.C. 3801, within 15 days after receipt of accelerated payments from the Government, the Contractor shall make accelerated payments to its small business subcontractors under this contract, to the maximum extent practicable and prior to when such payment is otherwise required under the applicable contract or subcontract, after receipt of a proper invoice and all other required documentation from the small business subcontractor.

(2) The Contractor agrees to make such payments to its small business subcontractors without any further consideration from or fees charged to the subcontractor.

\* \* \* \* \*

9. Amend section 52.244-6 by—

a. Revising the date of the clause; and

b. Removing from paragraph (c) (1) (xix) “(NOV 2021)” and adding “([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER])” in its place.

The revision reads as follows:

**52.244-6 Subcontracts for Commercial Products and Commercial Services.**

\* \* \* \* \*

SUBCONTRACTS FOR COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES ( [INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] )

\* \* \* \* \*

[FR Doc. 2023-02425 Filed: 2/13/2023 8:45 am; Publication Date: 2/14/2023]